

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 19, 2007

**DENNIS M. PHILLIPS, ET AL. v. CUMBERLAND MOUNTAIN RETREAT
PROPERTY OWNERS ASSOCIATION, INC.**

Appeal from the Chancery Court for Cumberland County
No. 9247-10-04 Ronald Thurman, Chancellor

No. E2006-02190-COA-R3-CV - FILED JULY 27, 2007

Dennis M. Phillips brought this action seeking financial records and an accounting of certain transactions of the Cumberland Mountain Retreat Property Owners Association (the “Association”), a nonprofit landowners’ association of which he was a member. He alleged mismanagement, breach of fiduciary duty, and other wrongdoing by the officers and directors of the Association. The dispositive issues are whether the trial court correctly granted the Association’s motion to dismiss for failure to state a claim upon which relief can be granted, and whether the trial court erred in ordering Mr. Phillips to pay the Association’s attorney’s fee. We hold that the complaint states a claim for which relief can be granted under Tenn. Code Ann. § 48-66-101, *et seq.*, which entitles members of a nonprofit corporation to copy and inspect corporate records under certain circumstances. We therefore reverse the judgment of the trial court dismissing Mr. Phillips’ action and the award of attorney’s fees against him.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed;
Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Dennis M. Phillips, Crossville, Tennessee, *pro se* Appellant.

Sharon Potter, Knoxville, Tennessee, for the Appellee, Cumberland Mountain Retreat Property Owners Association, Inc.

OPINION

I. Background

Mr. Phillips, as a member of the Association, made a written request to the Association for certain financial and business records. The Association’s lawyer responded that some of the

requested items were public records, one item did not exist, and that the remainder were corporate accounting records “for which [he] must first comply with the requirements set forth in T.C.A. §48-26-103... .” Mr. Phillips sued the Association alleging that the directors and officers of the Association “have been paying themselves commissions on Lots sold within the development, mismanaged corporate funds, paid salaries to unauthorized officers, have breached their fiduciary duty to the members, failed to act under normal and reasonable business practices and failed to take reasonable steps to prevent the dilapidation of corporate funds and assets.” Mr. Phillips asked the trial court to require the Association to produce for inspection and copying certain financial and accounting records of the Association for the stated purpose of aiding the members “in their determination of whether the business of the corporation is being properly conducted and whether there has been any breach of fiduciary duty by any director or officer of the corporation.” He also sought an accounting for all transactions for the past 40 months of the Association, attorney’s fees, other expenses, and costs. Mr. Phillips later amended his complaint to seek an order requiring the Association to produce accounting records “that specifically relate to the awarding, giving or paying commissions to its Board members for the sale of Corporate properties or assets including the specific acts of refunds or monies evidenced by the return of funds of the two checks attached hereto as Exhibit ‘A’ to be reviewed by the Plaintiff’s agents and/or attorney as provided by Tenn. Code Ann. § 48-66-101 – 48-66-102.”

The Association filed a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Tenn. R. Civ. P. 12.02. The trial court ruled that Mr. Phillips “failed to meet the pleading requirements to state a cause of action upon which relief can be granted,” and dismissed the action. The trial court further ordered Mr. Phillips to pay the Association’s attorney’s fees, and awarded the Association a judgment in the amount of \$10,858.03 for attorney’s fees and expenses. Although originally filed as a derivative action, at this stage of the proceedings, this suit is maintained by Mr. Phillips individually. ¹

II. Issues Presented

Mr. Phillips raised many issues in his brief which we have carefully reviewed. We have determined that the dispositive issues on appeal are as follows:

¹This action began as a derivative action, with Mr. Phillips and John W. Jeffords as the named Plaintiffs. Mr. Jeffords subsequently withdrew from the action and dismissed his claim. The trial court held that the statutory requirements for a derivative action had not been met and refused to certify the lawsuit as a derivative action or as a class action, and Mr. Phillips has not appealed the trial court’s ruling in this regard. A little more than a year after the complaint was filed, Mr. Phillips’ attorney requested to withdraw as his counsel, and the trial court permitted his withdrawal after a hearing. Mr. Phillips subsequently proceeded *pro se*. Mr. Phillips raises an issue whether the trial court erred in allowing his counsel to withdraw “without [giving] notice to all his clients.” The record shows that Mr. Phillips was given notice of his attorney’s motion to withdraw, an opportunity to attend and participate in the withdrawal hearing, and ample time to find another attorney. Mr. Phillips does not have standing to complain about the alleged lack of notice to “other clients” unnamed by Mr. Phillips and not otherwise specified elsewhere in the record.

1. Whether the trial court erred in dismissing Mr. Phillips' action for failure to state a claim upon which relief can be granted.

2. Whether the trial court erred by ordering Mr. Phillips to pay the Association \$10,858.03 for attorney's fees.

III. Analysis

A. Standard of Review

The issue before us is whether the trial court erred in granting the Association's motion to dismiss. A Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of the plaintiff's proof. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). In our review, we are required to construe the complaint liberally in Mr. Phillips' favor and take the allegations of the complaint as true. *Id.* As we stated in *Pendleton v. Mills*, 73 S.W.3d 115 (Tenn. Ct. App. 2001):

The sole purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to test the sufficiency of the complaint, not the strength of the plaintiff's evidence. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). It requires the courts to review the complaint alone, *Daniel v. Hardin County Gen. Hosp.*, 971 S.W.2d 21, 23 (Tenn. Ct. App. 1997), and to look to the complaint's substance rather than its form. *Kaylor v. Bradley*, 912 S.W.2d 728, 731 (Tenn. Ct. App. 1995). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief or when the complaint is totally lacking in clarity and specificity. *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).

A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Winchester v. Little*, 996 S.W.2d 818, 821-22 (Tenn. Ct. App. 1998); *Smith v. First Union Nat'l Bank*, 958 S.W.2d 113, 115 (Tenn. Ct. App. 1997). Accordingly, courts reviewing a complaint being tested by a Tenn. R. Civ. P. 12.02(6) motion must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, *Stein v. Davidson Hotel*, 945 S.W.2d 714, 716 (Tenn. 1997), and by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts. Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 5-6(g), at 254 (1999). On

appeal from an order granting a Tenn. R. Civ. P. 12.02(6) motion, we must likewise presume that the factual allegations in the complaint are true, and we must review the trial court's legal conclusions regarding the adequacy of the complaint without a presumption of correctness. *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furne & Ginsburg, P.A.*, 986 S.W.2d at 554; *Stein v. Davidson Hotel*, 945 S.W.2d at 716.

Pendleton, 73 S.W.3d at 120-21.

B. Review of Corporate Accounting Records

Bearing in mind the standard of review stated above, an examination of Mr. Phillips' complaint and amended complaint in this case persuades us that he has stated a claim for which relief can be granted pursuant to Tenn. Code Ann. § 48-66-102. This statute, which applies to nonprofit corporations such as the Association, provides in relevant part as follows:

(a) Subject to § 48-66-103(c),² a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in § 48-66-101(e)³ if the member gives the corporation a written demand at least five (5) business days before the date on which the member wishes to inspect and copy.

(b) A member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (c) and gives the corporation written notice at least five (5) business days before the date on which the member wishes to inspect and copy:

(1) Excerpts from any records required to be maintained under § 48-

²Tenn. Code Ann. § 48-66-103(c) provides, among other things, that a corporation "may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member."

³The records described in Tenn. Code Ann. § 48-66-101(e) include (1) the corporation's charter and current amendments; (2) its bylaws and current amendments; (3) resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations and obligations of members; (4) minutes of all meetings of members and records of all actions approved by the members for the past three years; (5) all written communications, including financial statements, to its members within the past three years; (6) a list of the names and business or home addresses of its current directors and officers; and (7) its most recent annual report delivered to the secretary of state.

66-101(a)⁴, to the extent not subject to inspection under subsection (a);

(2) Accounting records of the corporation; and

(3) Subject to § 48-66-105, the membership list.

(c) A member may inspect and copy the records identified in subsection (b) only if:

(1) The member's demand is made in good faith and for a proper purpose;

(2) The member describes with reasonable particularity the purpose and the records the member desires to inspect; and

(3) The records are directly connected with the purpose for which the demand is made.

Tenn. Code Ann. § 48-66-102.

As can be seen, Tenn. Code Ann. § 48-66-102(b)(2) entitles Mr. Phillips, as a member of the Association, to inspect and copy its “accounting records” if he gives the required written notice and meets the three requirements listed above in subsection 48-66-102(c). Mr. Phillips alleged mismanagement of corporate funds, breach of fiduciary duty, and unauthorized and/or illegal payments of real estate commissions paid by the directors and officers to themselves. Mr. Phillips’ stated purpose for requesting to inspect and copy the Association’s records was to aid in a determination of “whether the business of the corporation is being properly conducted and whether there has been any breach of fiduciary duty by any director or officer of the corporation.” On its face, this purpose is proper and described with reasonable particularity, and the records requested are directly related to the stated purpose. Additionally, the complaint alleged that Mr. Phillips had provided written notice of his request as required by the statute.

It is evident from Mr. Phillips’ complaint and amended complaint that he sought from the trial court an order requiring the Association to allow him to inspect and copy its accounting records. Tennessee Code Annotated § 48-66-104 specifically provides for such an action, stating as follows:

(a) If a corporation does not allow a member who complies with § 48-66-102(a) to inspect and copy any records required by that subsection to be available for inspection, a court of record having equity jurisdiction in the county where the corporation's principal office (or,

⁴Tenn. Code Ann. § 48-66-101(a) requires a corporation to keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors in place of the board of directors.

if none in this state, its registered office) is located may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the member.

(b) If a corporation does not within a reasonable time allow a member to inspect and copy any other record, the member who complies with § 48-66-102(b) and (c) may apply to a court of record having equity jurisdiction in the county where the corporation's principal office (or, if none in this state, its registered office) is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(c) If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the member's costs (including reasonable counsel fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the member to inspect the records demanded.

(d) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding member.

We find that Mr. Phillips' complaint states a cause of action for which relief can be granted, and therefore the trial court erred in dismissing his action pursuant to Tenn. R. Civ. P. 12.02.

In his initial complaint, Mr. Phillips requested that the trial court order an accounting of all the Association's transactions for the 40 months prior to the filing of the complaint, in order to aid in determining whether Mr. Phillips' allegations of mismanagement and breach of fiduciary duty were substantiated. "An account is a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contracts or some fiduciary relation...The Chancery Court, on a proper complaint filed for that purpose and sustained, will open either a stated or settled account, where by reason of some mistake, or omission, or accident, or fraud, or undue advantage, the account is vitiated, and the balance incorrectly fixed; or where by reason of some relation of trust or confidence between the parties, the plaintiff was at a disadvantage, and as a consequence the account is inequitable." GIBSON'S SUITS IN CHANCERY, § 30.01 (8th ed. 2004)(footnotes omitted). As the case currently stands, with only the complaint, as amended, contained in the record, we cannot determine whether Mr. Phillips' allegations are substantiated, and whether an accounting should be ordered. Presumably, the requested records will shed significant light on that inquiry. It was therefore premature for the trial court to have dismissed his action for an accounting under Rule 12.02. We vacate that ruling, and hold that Mr. Phillips is entitled to a hearing upon remand upon

the issue of whether an accounting is warranted after he receives and reviews the documents to which he is entitled under Tenn. Code Ann. § 48-66-101, *et seq.*

Regarding the trial court's judgment requiring Mr. Phillips to pay the Association's attorney's fees, the trial court's order states only that "Defendant's Motion to Dismiss the Amended Complaint is granted, with costs of this action to be taxed against the Plaintiff, DENNIS PHILLIPS, including reasonable attorney's fees and expenses incurred by the Defendant in the defense of this cause." After a hearing for determination of reasonable fees and expenses, the trial court awarded an attorney's fee in the amount of \$10,858.03 "pursuant to T.C.A. Section 48-56-401(e)." Tennessee Code Annotated § 48-56-401(e) provides that upon termination of a proceeding brought in the right of a corporation to procure a judgment in its favor, "the court may require the plaintiffs to pay any defendant's reasonable expenses (including counsel fees) incurred in defending the suit if it finds that the proceeding was commenced frivolously or in bad faith." The trial court made no finding of bad faith or frivolous intent, nor could such a finding be reasonably inferred from the face of the complaint and amended complaint. For this reason, and in light of our disposition of this appeal in Mr. Phillips' favor, we hold that the award of attorney's fees against him was in error.

The Association has filed a motion with this Court to consider post-judgment facts pursuant to Tenn. R. App. P. 14, which we have considered and found not to be well taken, and which is respectfully denied. The Association also argues that this appeal is frivolous and requests attorney's fees. We do not find this appeal to be frivolous.

IV. Conclusion

For the aforementioned reasons, the judgment of the trial court is reversed and the case remanded for further proceedings consistent with this opinion. Costs on appeal are assessed to the Appellee, Cumberland Mountain Retreat Property Owners Association, Inc.

SHARON G. LEE, JUDGE